DOCUMENT RESUME

ED 333 515 CS 507 497

AUTHOR Scott, David K.
TITLE Punitive Speech: Establishing a Utilitarian Standard.
PUB DATE Nov 90
NOTE 17p.; Paper presented at the Annual Meeting of the Speech Communication Association (76th, Chicago, IL, November 1-4, 1990).
PUB TYPE Reports - General (140) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Court Litigation; Crime Prevention; *Freedom of Speech; Legal Problems; *Punishment; Recidivism; *Sentencing; Verbal Communication
IDENTIFIERS *Embarrassment; *Punitive Speech

ABSTRACT

Recent court philosophy has introduced the concept of court-sanctioned "punitive speech." In response to the rising concern over drunken driving and other crimes, many courts are using public humiliation, in the form of public apologies or bumper stickers/license plates that proclaim the crime, as a form of punishment. The key question is whether the imposition of court mandated speech forces those convicted of a crime to spread an ideological message against their will, contrary to the free speech rights guaranteed by the Constitution. Several instances from around the United States demonstrate how court mandated speech has been used in drunken driving sentences. Examination of preliminary court decisions shows that societal interest takes priority over individual speech rights, and court mandated "punitive speech" has been established as a precedent. There may be potential dangers, however, in this judicial precedent in terms of the erosion of free speech rights. It will be interesting to study the demarcation line that will be drawn by the courts in the coming years when weighing speech rights versus a utilitarian standard. (PRA)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED333515

Punitive Speech:
Establishing a Utilitarian Standard

David K. Scott
University of Oklahoma

Debut Paper

for
Speech Communication Association
November 1-4, 1990
Chicago, Illinois

CS507497

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
David Scott

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
This document has been reproduced as received from the person or organization originating it.
Minor changes have been made to improve reproduction quality.
Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

Introduction

Much of the "free speech" literature has focused on the issue of speech constraints. Does the individual have an unconditional right to speak? Does the listener have a right to hear? Does the public have a right to know? etc. However, recent court philosophy has introduced the concept of court sanctioned "punitive speech."

Specifically, in response to the rising concern over DUI and other crimes, many courts are using public humiliation as a form of punishment. This humiliation has taken the form of public apologies or bumper stickers/license plates that proclaim their crime.

The key question is whether the imposition of court mandated speech forces those convicted of a crime to spread an ideological message against their will, contrary to the free speech rights guaranteed by our Constitution. This essay will examine the incidents of court mandated speech, look at the potential constitutional objections,

and examine the judicial philosophy behind the punishment.

Incidents of Court Mandated Speech

Midwest City, Oklahoma

In the fall of 1984, representatives of Mothers Against Drunk Driving (MADD) attended a meeting of the Midwest City Traffic Safety Board. MADD proposed a new form of punishment for the DUI offender, a bumper sticker that we be affixed to the DUI offender's vehicle. With the recommendation of the board, and the enthusiastic support of the Midwest City Municipal Judge, the concept was implemented at the beginning of 1985 and was implemented for two years. During this time a convicted drunk driver in Midwest City would potentially face jail, a fine or a bumper sticker that read: "I am a convicted DUI driver. Report any erratic driving to the Midwest City Police." The stickers were issued either separately or in conjunction with other penalties. Under the court's rules, the bumper sticker must be displayed for six months. During this time the

Midwest City police check the odometer to make sure the car is actually being driven and seen on the road.

Comments from bumper sticker participants illustrate the impact of this form of speech. One participant commented that the main problem he encountered with the bumper sticker was other motorists being discourteous or laughing at him. Another participant commented: "well, (it's been) a little bit humiliating at times. When friends and people ask me about it, they always have to go into the story about what has happened to me. It's just been a little bit embarrassing."

The overall effect of the program has been the object of some research. Scott (1988) analyzed the effect of the program on two levels. One level compared recidivism rates of offenders who received bumper stickers as against those who received conventional sentences (fine or jail) over the period 2/1/85 to 3/9/87. Conventional punishments had 11.8% recidivism rate as opposed to a 1.6% rate for those receiving the bumper sticker. In terms of a general deterrent effect,

the ratio of accidents involving alcohol to all accidents in Midwest City was cut approximately in half, while that ratio remained roughly constant statewide. The number of DUI incidents dropped significantly after the bumper sticker program began. Finally, a comparison of DUI trends with a bordering "sister city" of Del City showed Midwest City with a general downward trend while Del City had an upward trend.

By late 1987 the bumper sticker punishment had fallen into disfavor in Midwest City. Midwest City court records show the last bumper sticker was issued in February 1987. This decision may have been motivated by a $5.5 million dollar civil rights lawsuit filed filed the same month challenging legality of the punishment.

New Philidelphia, Ohio

Since 1982, New Philidelphia, Ohio, has been requiring some defendants convicted of drunk driving and other serious offenses to put special license plates on their vehicles, which in effect advertises their offense. Unlike other similar

programs there is no writing on the plate, only the color (bright yellow) conveys the message.

In terms of program effectiveness, total DUI arrests dropped from 750 in 1981 to a current annual average of approximately 300 a year (Szanton, 1989). The number of traffic fatalities in his jurisdiction has dropped from 25 to between 3 and 5 a year (p. 7). The program is still currently in operation.

Champaign, Illinois

Illinois Law allows the use of a program called "court supervision." Under this program first offenders are given a provisional probationary sentence which upon successful completion no judgment is entered against the offender and there is no record of the offense. Typically the probation is a form of community service.

In January 1988, Champaign County, Illinois offered a new variant of this sentence. DUI offenders are offered full driving privileges under the condition that they place a "apology ad" in their hometown daily newspaper. The ad would

also include a photograph of the "mug shot" taken at the police station when the offender was booked.

The Champaign program was quickly the target of a lawsuit. A three-judge Illinois Appellate Court concluded that the program overstepped the bounds of the original state statute that authorized the court supervision program. Legislation has been introduced in the Illinois legislature that would permit judges to use apology ads as a condition of court supervision (Szanton, 1989).

Sarasota, Florida

In the spring of 1985, two Florida Sarasota County judges devised a plan in which individuals convicted of driving under the influence would be ordered to affix a bumper sticker to their personal vehicle that read: "Convicted DUI - Restricted License". Individuals convicted of DUI would have their licenses suspended for between six months and one year. A person whose license is suspended is eligible for a restricted license which would allow the individual to drive for

employment purposes only. This restricted license is only granted after the individual completes a driver training or substance abuse education course and presents a court order for reinstatement. As a condition of reinstatement two Sarasota County judges would not allow reinstatement unless the defendant agreed to affix the DUI sticker to their primary vehicle.

The local public defender's office filed suit challenging the constitutionality of the punishment. The Florida 2nd District Court of Appeals upheld the constitutionality of the program.

Initial data from Sarasota indicated 33% drop in DUI arrests during this time period (Szanton, 1989). The program has been discontinued based on the retirement and advancement of the original judges who initiated the program. Succeeding judges have been unwilling to carry on the program.

Constitutional Objections

Constitutional objections to "punitive speech" have centered on the First and Eighth Amendments. On First Amendment grounds the concept of "punitive speech" may be in violation of Wooley v. Maynard (1972) in which the United States Supreme Court held that the State may not constitutionally required an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observe and read by the public. In this case the State of New Hampshire printed the motto "Live Free or Die" on automobile license plates. A Jehovah's Witness objected to this motto on religious grounds. The Supreme Court noted that the First Amendment protects not only one's right to speak but also one's right to refrain from speaking. The court concluded that the State had no sufficient countervailing interest to justify this. In Goldschmitt it was argued that the bumper sticker is viewed as a "public service announcement," which is unconstitutional to

require those who do not believe in that sentiment to advertise for the benefit of others.

A second constitutional objection is that court mandated speech represents cruel and unusual punishment and is in violation of the Eighth Amendment. Mandated speech has been compared to puritanical times where shame and humiliation were used to punish. Specifically, it was argued that the bumper sticker requirement is designed to destroy a defendant's status in the community. Through the advertisement as a convicted criminal the individual suffers public humiliation and loss of respect throughout the community. Even mental anguish based on anxiety caused by the public humiliation may represent cruel and unusual punishment.

Judicial Philosophy on Mandated Speech

In weighing constitutional issues it is not unusual for the judiciary to employ a balancing of individual rights versus societal good. Considering that this form of punishment is a

judicial initiative, it is interesting to note the judicial philosophy behind the punishment.

Judge Edward O' Farrell the initiator of the New Philidelphia, Ohio, DUI license plate states:

> ...my approach has been to deter the crime of drunken driving because the traditional approach has failed and failed miserably. People get their licenses suspended by judges everyday in this country and walk out of the courtroom, in fact, and get in vehicles and drive...the plate has put on because they have a person who is in a repeat offense, out of control, no courts have been able to control them, and this is a tool to allow that person to somehow stay out behind the wheel and possibly not kill somebody...(Nightline, 1986).

In essence Farrell is arguing that public safety takes precedence over individual speech rights. Judge Kenneth Spears, advocate of the Midwest City bumper sticker, points to an individual utilitarian standard: "In these troubled economic

times do we really want to deprive an individual's and possibly his (sic) family's livelihood by a mandatory thirty day jail sentence?" (Scott, 1988). Spears also points to a public safety factor in terms that other drivers are forewarned of possible dangerous drivers.

The courts in adjudicating this issue have followed a utilitarian philosophy. The Florida appellate court in Goldschmitt specifically subordinates First Amendment rights based on societal interest. The court, while believing the bumper sticker is "no more ideological than a permit to park in a handicapped parking space," felt that the state interest overrode individual speech rights. This was based on the fact that the criminal behavior has already been committed prior to the requirement that the message be displayed "as a form of penance and a warning to other potential wrongdoers." This judgment specifically employs the weighing standard established in Wooley v. Maynard of state interest versus individual rights. In this case the court felt the state had a sufficient interest to curtail the

speech rights of the individual lawbreaker. In support of their link to societal interest the court referred to People v. McDonald (1976) where a purse snatcher was required to wear taps on his shoes whenever he left his residence, despite the defendant's plea that this was tantamount to a sign saying "I am a thief."

The Illinois appellate court in State v. Johnson did not take a specific constitutional stand. In this case, the court ruled that the apology ad was illegal based on lack of judicial authority. However the court did allude to a utilitarian standard to justify this form of punishment.

> The offense of driving under the influence of intoxicating liquor is a serious one which has caused much carnage...(the defendant) inflicted no injury on anyone while driving in that condition, but that that fortunate result is mostly fortuitous. I do not consider the condition to be too harsh for the conduct involved here.

Summary

Thus, based on preliminary court decisions it is clear that societal interest takes priority over individual speech rights. Court mandated "punitive speech" has been established as a precedent. However, there may be potential dangers in this judicial precedent in terms of erosion of free speech rights. Legal scholar Alan Dershowitz points to the dangers of inductive judicial reasoning:

> But there is the problem of collective responsibility, of people being tarred with a brush that's too broad. There is the sense, a kind of totalitarian sense, that exists in many communist countries that you have to go around admitting your own guilt, proclaiming your own guilt, That is more suitable to a religious society, than it is to a multicultured, heterogeneous society like our own. There are dangers (Nightline, 1986).

It will be interesting to note the demarcation line that will be drawn by the courts in the coming years when weighing speech rights versus a utilitarian standard. One particularly ominous passage from Goldschmitt states "the deterrent, and thus the rehabilitative effect of punishment may be heightened if it inflicts disgrace and contumely in a dramatic and spectacular manner." The concept of court mandated "punitive speech" based on this wide of a penumbra holds the potential for erosion of free speech rights.

References

ABC News. (1986). Public Humiliation. Nightline Transcripts, Journal Graphics Inc., (New York, New York).

Goldschmitt v. State. (1986). 490 So.2d 123 (Fla. App.2 Dist.).

Johnson v. State. (1988). No.4-88-0064 (Ill. App 4 Dist.).

Scott, David K. (1988) Deterring Drunken Driving Through Humiliation, Bureau of Government Research (Norman, Oklahoma).

Szanton, Nathan. (1989). "Deterring the Drinking Driver Through Public Humiliation: Profiles of Four Experiments." (unpublished paper).

Wooley v. Maynard. (1977). 430 U.S.705, 97 (St.Ct. 1428, 51 L.Ed.2d 752).